

UNITED STATES DISTRICT COURT  
DISTRICT OF PUERTO RICO

JOSHUA AYALA-LUGO,

Petitioner,

V.

Civil No. 10-1389 (JAF)

(Crim. No. 07-453)

UNITED STATES OF AMERICA,

### Respondent.

## OPINION AND ORDER

Petitioner, Joshua Ayala-Lugo, brings this pro-se petition under 28 U.S.C. § 2255 for relief from sentencing by a federal court, alleging that the sentence was imposed in violation of his constitutional rights. (Docket No. 1.) The Government opposes (Docket No. 4), and Petitioner replies (Docket No. 5). An evidentiary hearing was held on August 3, 2011.

I.

## **Factual and Procedural Summary**

On September 9, 2008, Petitioner entered into an agreement with the Government to plead guilty to one count of conspiracy to possess with intent to distribute narcotics. (Crim. No. 07-453, Docket No. 1233.) In exchange for Petitioner's plea, the Government agreed to recommend a sentence at either the statutory minimum or the lower end of the guidelines, depending on Petitioner's criminal history. (*Id.*) The plea agreement included a waiver of direct appeal. (*Id.*) During the colloquy at his change-of-plea hearing, Petitioner acknowledged the waiver of his right to appeal:

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1 THE COURT: You are waiving your right to appeal  
2 as part of this plea bargaining process. There will be  
3 no appeal. The judgment that I will enter will be the  
4 final judgment. Do you understand that?5 THE DEFENDANT: Yes.  
6

7 (Crim. No. 07-453, Docket No. 2119 at 13.)

8 At the sentencing hearing on December 18, 2008, Petitioner again was informed that he  
9 had waived his right to appeal by entering the plea bargain. (*Id.*, Docket No. 2118 at 6.) We  
10 sentenced Petitioner to the 120-month term recommended in the plea agreement, and we entered  
11 final judgment on December 18, 2008. (*Id.*, Docket No. 1610.) On May 11, 2010, Petitioner  
12 filed his § 2255 petition—over four months after the one-year statute of limitations expired, see  
13 § 2255(f).14 Petitioner raised a single claim for § 2255 relief: Ineffective assistance of counsel arising  
15 from the failure to file a direct appeal. (Docket No. 1-2.) The Government replied and asserted  
16 the § 2255(f) time bar as a defense. (Docket No. 4.) Petitioner responded, claiming that  
17 equitable tolling is applicable to his case. (Docket No. 5.)18 We appointed counsel for Petitioner and held an evidentiary hearing on August 3, 2011,  
19 to hear further evidence on the merits of Petitioner's claim. At the hearing, both Petitioner and  
20 his trial attorney, Vladimir Mihailovich Nikolic, testified. Mihailovich stated that he had  
21 explained the waiver of appellate rights to Petitioner multiple times prior to the change of plea.  
22 He explained that Petitioner had been hesitant to enter the plea bargain because Petitioner  
23 disagreed with the Government's characterizing his role in the conspiracy as a runner instead  
24 of a seller. Mihailovich further stated that, after sentencing, Petitioner did not ask him to file

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16 an appeal. Furthermore, he stated that, in his view, there was no reasonable basis for filing an  
17 appeal.18 Petitioner testified that Mihailovich had presented the plea agreement to him and  
19 explained the waiver of appellate rights. He also claimed, however, that during the plea  
20 colloquy he did not understand the waiver of appeal as explained to him but had affirmed his  
21 understanding only because Mihailovich instructed him to answer "yes" to all questions. When  
22 asked during his testimony if he would have answered "yes" to a request in the colloquy to  
23 throw himself down a hill, Petitioner responded that he would not. Furthermore, Petitioner  
24 testified that after sentencing he asked Mihailovich to file an appeal but that Mihailovich told  
25 him he would not file an appeal on his behalf because he was no longer his lawyer and was not  
26 required to file an appeal. Finally, when asked on what grounds he sought to appeal his  
27 sentence, Petitioner stated that he believed he should have been held responsible for a smaller  
28 amount of narcotics.29  
30 II.31  
32 **Standard for Relief Under 28 U.S.C. § 2255**33 A federal district court has jurisdiction to entertain a § 2255 petition when the petitioner  
34 is in custody under the sentence of a federal court. See 28 U.S.C. § 2255. A federal prisoner  
35 may challenge his or her sentence on the ground that, *inter alia*, it "was imposed in violation of  
36 the Constitution or laws of the United States." Id.37 In general, a petitioner cannot be granted relief on a claim that was not raised at trial or  
38 on direct appeal, unless he can demonstrate both cause and actual prejudice for his procedural  
39 default. See United States v. Frady, 456 U.S. 152, 167 (1982). Claims of ineffective assistance  
40 of counsel, however, are exceptions to this rule. See Massaro v. United States, 538 U.S. 500

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1 (2003) (holding that failure to raise ineffective assistance of counsel claim on direct appeal does  
2 not bar subsequent § 2255 review).

3 **III.**

4 **Analysis**

5 Because Petitioner appears pro se, we construe his pleadings more favorably than we  
6 would those drafted by an attorney. See Erickson v. Pardus, 551 U.S. 89, 94 (2007).  
7 Nevertheless, Petitioner's pro se status does not excuse him from complying with procedural  
8 and substantive law. Ahmed v. Rosenblatt, 118 F.3d 886, 890 (1st Cir. 1997).

9 Petitioner claims that both his inability to speak English and delays by the Federal  
10 Bureau of Prisons in forwarding his legal documents warrant the application of equitable tolling  
11 to his claim. A district court may choose to sidestep an equitable tolling inquiry and decide the  
12 substantive claims in a § 2255 petition when it is clear that the Government would prevail on  
13 the merits. See Ramos-Martínez v. United States, 638 F.3d 315, 324–25 (1st Cir. 2011).  
14 Having heard evidence of the underlying ineffective assistance of counsel claim, we find it  
15 proper to resolve this case on the merits.

16 The success of a claim of ineffective assistance of counsel under § 2255 depends on a  
17 petitioner's showing both a deficient performance by his trial counsel and a resulting prejudice.  
18 Peralta v. United States, 597 F.3d 74, 79 (1st Cir. 2010). Deficient performance is present  
19 where the trial counsel's representation “fell below an objective standard of reasonableness,”  
20 a standard that is informed by “prevailing professional norms.” Id. (quoting Strickland v.  
21 Washington, 466 U.S. 668, 688 (1984)). To succeed on a claim of ineffective assistance of  
22 counsel, a petitioner must overcome the “strong presumption that counsel's conduct falls within  
23 the wide range of reasonable professional assistance.” Strickland, 466 U.S. at 689. Choices

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2 made by counsel that could be considered part of a reasonable trial strategy rarely amount to  
3 deficient performance. See id. at 690. Counsel's decision not to pursue "futile tactics" will not  
4 be considered deficient performance. Vieux v. Pepe, 184 F.3d 59, 64 (1st Cir. 1999); see also  
5 Acha v. United States, 910 F.2d 28, 32 (1st Cir. 1990) (stating that failure to raise meritless  
6 claims is not ineffective assistance of counsel). Prejudice exists where "there is a reasonable  
7 probability that, but for counsel's unprofessional errors, the result of the proceeding would have  
been different." Strickland, 466 U.S. at 694.

8 Petitioner fails to demonstrate that Mihailovich's performance was deficient.  
9 Mihailovich was credible in his testimony that Petitioner did not ask him to file an appeal.  
10 Petitioner's testimony, by contrast, was incredible and contradictory. In his initial filing,  
11 Petitioner had stated that after instructing Mihailovich to file an appeal, he was under the  
12 impression that it had been filed and did not learn otherwise until the time to appeal had expired.  
13 Yet in his testimony at the evidentiary hearing, Petitioner stated that Mihailovich told him he  
14 would not file an appeal. Also, given the numerous times Petitioner was informed of the waiver  
15 and his testimony that he understood the waiver of appeal when explained to him by  
16 Mihailovich, we find it unlikely that he then ordered Mihailovich to file an appeal.

17 Finally, we note that Petitioner attempted to raise at his evidentiary hearing, for the first  
18 time, a claim that his plea was not knowing and voluntary. We do not credit Petitioner's  
19 testimony that he did not understand that he had agreed to waive his right to direct appeal. He  
20 testified that the waiver was explained to him by Mihailovich and that he understood its  
21 meaning prior to the change of plea. It is incredible that he later lost this understanding and yet  
22 represented to the court at the change-of-plea hearing that he understood the right and its  
23 waiver.

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3 **IV.**

5 **Certificate of Appealability**

3 In accordance with Rule 11 of the Rules Governing § 2255 Proceedings, whenever we  
4 deny § 2255 relief we must concurrently determine whether to issue a certificate of appealability  
5 (“COA”). We grant a COA only upon “a substantial showing of the denial of a constitutional  
6 right.” 28 U.S.C. § 2253(c)(2). To make this showing, “[t]he petitioner must demonstrate that  
7 reasonable jurists would find the district court's assessment of the constitutional claims  
8 debatable or wrong.” Miller-El v. Cockrell, 537 U.S. 322, 338 (2003) (quoting Slack v.  
9 McDaniel, 529 U.S. 473, 484 (2000)). We see no way in which a reasonable jurist could find  
10 our assessment of Petitioner's constitutional claims debatable or wrong. Petitioner may request  
11 a COA directly from the First Circuit, pursuant to Rule of Appellate Procedure 22.

12 **V.**

13 **Conclusion**

14 For the foregoing reasons, we hereby **DENY** Petitioner's § 2255 motion (Docket No. 1).

15 **IT IS SO ORDERED.**

16 San Juan, Puerto Rico, this 30<sup>th</sup> day of August, 2011.

17 s/José Antonio Fusté  
18 JOSE ANTONIO FUSTE  
19 United States District Judge